



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 44/2024

In the matter between:

THE DIRECTOR-GENERAL:

**DEPARTMENT OF FORESTRY, FISHERIES
AND THE ENVIRONMENT**

First Appellant

**THE DEPARTMENT OF FORESTRY, FISHERIES
AND THE ENVIRONMENT**

Second Appellant

and

THE SHERIFF, PRETORIA NORTH-EAST

First Respondent

KEVIN MANDA

Second Respondent

**THE GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

Third Respondent

CHANCE KHAZAMULU N.O.

Fourth Respondent

Heard: 13 February 2025

Delivered: 12 May 2025

Coram: Nkutha-Nkontwana JA, Waglay et Mooki AJJA

JUDGEMENT

MOOKI AJA

Introduction

[1] The appeal concerns the Labour Court's refusal of what was proffered as a security bond to stop the operation of an award pending review proceedings. The Labour Court determined that the security in question was not to the satisfaction of the court as contemplated in section 145(7) of the Labour Relations Act¹ (LRA).

Background

[2] Mr Manda, the second respondent, challenged his dismissal by the Department of Forestry, Fisheries and the Environment (the Department). The third respondent rendered an award in Mr Manda's favour, including that Mr Manda be reinstated.

[3] The Minister in the Department instituted review proceedings to have the award set aside. The application was accompanied by a 'security bond' by the first appellant (the Director-General), who issued the security bond in the name of the Department. The security bond was to stop the operation of the award.

[4] The security bond stipulated the following:

'WHEREAS:

1. On 18 July 2023, an arbitration award was issued by the third respondent, Commissioner C KHAZAMULA, under the auspices of the second respondent (GPSSBC) and under Case Number GPBC1879/2020.

¹ Act 66 of 1995, as amended.

2. In terms of the arbitration award, the applicant was ordered to REINSTATE the first respondent as from 20 September 2019 with backpay from date of dismissal up to date of the arbitration award.

AND WHEREAS the applicant has instituted, before the above Honourable Court, an application to review the arbitration award.

AND WHEREAS section 145 (7) of the Labour Relations Act, 66 of 1995 (as amended) permits the applicant to furnish security to the satisfaction of the court, in which event the operation of the arbitration award is automatically suspended.

AND WHEREAS section 145(8)(a) of the Labour Relations Act, 66 of 1995 (as amended) requires, unless the court directs otherwise, security to be furnished in the case of an order for reinstatement or re-employment, equivalent to 24 month's (sic) remuneration or in the case of an order for compensation, security equivalent to an amount of the compensation awarded.

NOW THEREFORE, I, the undersigned Nonfundo Tshabalala in my capacity as the DIRECTOR GENERAL OF THE DEPARTMENT OF FORESTRY, FISHERIES AND THE ENVIRONMENT, confirm that the applicant/Department is held firmly bound to the second and third respondent to discharge for and on behalf of the applicant the aforesaid remuneration and/or compensation.

DATED AND SIGNED AT PRETORIA ON THIS THE 16TH DAY OF AUGUST 2023.

(Signed)

DIRECTOR GENERAL:

WITNESS1: (Signed)

WITNESS2: (Signed)

[5] Mr Manda disputed the validity of the security bond and took steps to enforce the award, including causing the Sheriff to attach the Department's movable property. Mr Manda contended that the security bond was not proper security because the Minister in the Department had not authorised the issuing of security to stay the operation of the award. Mr Manda contended that the security bond

breached section 66 of the Public Finance Management Act² (PFMA) for lack of authorisation by the Minister.

In the Labour Court

[6] The appellants then approached the Labour Court, seeking the following relief:

6.1 Declaring that the security bond furnished by the appellant constitutes sufficient and valid security as contemplated in sections 145(7) and (8) of the LRA;

6.2 Interdicting the Sheriff and Mr Manda from the removal and sale in execution of the Department's property pending the outcome of the review application;

6.3 In the alternative, declaring that the enforcement of the arbitration award be stayed pending the outcome of the review application as contemplated in section 145(3) of the LRA; and

6.4 Uplifting the attachment of the Department's movable property.

[7] The Labour Court (Allen-Yaman J) determined that the primary issue before that Court was whether the 'security bond' constituted security to the satisfaction of the Court within the meaning of section 145(7) and (8) of the LRA.³ It held that it did not.

[8] The Labour Court held that the security bond, albeit signed by the Director General as the accounting officer, was not an undertaking that the Department had sufficient funds at its disposal to satisfy the award; that the security bond was a document that purported to bind the Department for the payment of the award in due course.⁴ The Labour Court held that the provision of security in terms of section 145(7) of the LRA required the Department to have complied with section 66 of the PFMA and that there was no such compliance. Such non-compliance, according to the Labour Court, rendered the security bond an '*unauthorised transaction*', with the

² Act 1 of 1999.

³ Judgment of the court *a quo* at para 27.

⁴ *Ibid* at para 43.

result that the security bond could not bind the Department in due course.⁵ It was for these reasons that the Labour Court held that the security bond was not “*security to the satisfaction of the Court*” in terms of section 145(7) of the LRA.⁶

[9] The appellants contend that section 66 of the PFMA does not apply. They say the Labour Court erred because section 66 of the PFMA applied to new obligations, whereas the security bond did not give rise to a future financial commitment but concerned an existing obligation and a commitment to meet that obligation.

[10] The Labour Court determined that it would stay the award by exercising its discretion in terms of section 145(3) of the LRA. It was a conditional stay. The Labour Court stayed enforcement “*on condition that the Department provides security to the satisfaction of the Court in terms of section 145(7) read with section 145(8)(a) of the LRA within a period of four weeks of the date of the order*”.

[11] The stay was to lapse should the appellants fail to provide security as directed. The stay would also lapse should Mr Manda dispute that the security furnished complied with section 145(7) read with section 145(8)(a) of the LRA, and where the Department failed to apply for a declaratory order in relation to the sufficiency of such security within two weeks of Mr Manda advising the Department of such a dispute.

In this Court

[12] The appeal is with the leave of the Labour Court. The appeal is on the following grounds:

12.1 That sections 66 and 70 of the PFMA do not apply to security bonds furnished in terms of section 145(7) of the LRA, with the result that the validity of the security bond by the appellants did not hinge on compliance with those provisions of the PFMA; and

12.2 A party seeking an order suspending the operation of an arbitration award in terms of section 145(3) of the LRA is not required to demonstrate

⁵ Ibid at para 44.

⁶ Ibid at para 45.

that the obligation to furnish security ought to be dispensed with or the quantum of security reduced.

[13] The Labour Court held that 'security' as envisaged in section 145(7) of the LRA bore a meaning envisaged in s 66 of the PFMA and that:

'Its purpose is intended to serve to guarantee of the (sic) payment of an amount (due in terms of an award) at some time in the future. As such, when a department provides security in terms of s 145(7) it may only lawfully be done if effected by one authorised thereto, in compliance with s66 of the PFMA.'⁷

[14] The Labour Court determined that the security bond was not issued in compliance with section 66 of the PFMA for considerations mentioned in paragraph 8 above. The security bond was not, therefore, security to the satisfaction of the court.

[15] Section 66(1) of the PFMA applies to transactions concerning '*future financial commitments*' by institutions that are subject to the PFMA, such as the Department. Those transactions do not bind the Department without authorisation by the Minister.⁸

[16] The Department's furnishing of '*security*' for purposes of compliance with an arbitration award is not subject to section 66 of the PFMA. This is because such security is not a '*future financial commitment*' by the Department. A '*future financial commitment*' arises when there is no extant obligation to perform at the time an undertaking is given. Where there is an extant obligation, then the performance is in relation to a current commitment.

[17] The above statement is consistent with the findings by the Constitutional Court in *Road Traffic Management Corporation v Waymark (Pty) Limited*.⁹ The Road Traffic Management Corporation, in that matter, sought to avoid liability by contending that there was no ministerial approval and that section 66(3) of the PFMA

⁷ Ibid at para 37.

⁸ Section 68 of the PFMA.

⁹ [2018] ZACC 12; 2019 (6) BCLR 749 (CC) at para 45.

covered any agreement with a future financial commitment. The Constitutional Court said the following in relation to the term '*any future financial commitment*' in section 66 of the PFMA:

'A contextual reading of sections 66 and 68, given the chapter in which they are located, and the relation of that chapter to other chapters of the PFMA, lends itself to the interpretation that the phrase "any other transaction that binds or may bind that public entity to any future financial commitment" as referred to in section 66 must mean a transaction that is somehow similar to a credit or security agreement. [...].'

[18] The Constitutional Court also stated that "... *the context and structure of the PFMA impels the view that "any other transaction" [in section 66(3) of the PFMA] must be similar to loans and security, and distinct from most other transactions (especially those in section 54(2))*".¹⁰

[19] The furnishing of a security bond, such as in this case, is not a '*transaction*' as contemplated in section 66 of the PFMA. This is not to say that no obligations arise from the Department furnishing such a bond. Section 66 of the PFMA was not intended to address the type of undertaking, such as that by a department, as an employer, seeking to comply with the requirements of section 145(7) of the LRA.

[20] The Department's obligation to comply with the award became operative once the award was granted. 'Security' by the Department, for purposes of section 145(7) and in relation to the award, is thus not subject to section 66(1) of the PFMA because such security is not in relation to '*a future financial commitment*'. The Labour Court erred in holding that the Department's obligation in relation to the award concerned a commitment '*sometime in the future*'.

[21] A '*future financial commitment*' in section 66 of the PFMA entails instances such as where a body that is subject to section 66 of the PFMA undertakes, in one form or another, to burden the public purse in the future. An arbitration award is an

¹⁰ Ibid.

immediate commitment. There is nothing more for the Department to do other than to comply.¹¹

[22] The Labour Court erred in its finding that the security bond was not security to the satisfaction of that court only because the security bond was not issued in accordance with section 66 of the PFMA. Section 66(1) of the PFMA does not apply to the furnishing of security in relation to an extant arbitration award. The section applies to transactions that implicate future financial commitments. The security bond is not in respect of a future financial commitment by the Department.

[23] The respondents contended that the security bond was not 'good' for the purposes of section 145(7) of the LRA on the additional ground that the instrument does not specify an amount. The 'security bond' is a statement by the Department's accounting officer that the Department will make good on the award, should the review fail. It was unnecessary to specify the Rand value of the amount for which Mr Manda will be made good. The security bond concerns the award. The amount in the award for which the Department is liable is ascertainable by simple arithmetic.

[24] The respondent raised several preliminary points in his written submissions, namely that: the Minister in the Department was not joined in proceedings before the Labour Court; that the Director-General had no power to have issued the security bond, and that the order by the Labour Court is not susceptible to an appeal for being an interim order. The substance of these points is that the Labour Court ought not to have entertained the application, least of which granting a stay as ordered.

[25] Mr Manda says that the non-joinder of the Minister is a jurisdictional question that is dispositive of the appeal, as the Minister is the only person who had standing to have launched proceedings before the Labour Court. This is because the Minister is the applicant in the review proceedings. The appellants are not parties to the review.

¹¹ Subject to any challenge to the award that is lawfully available to the Department.

[26] Mr Manda did not raise the objections before the Labour Court. The objections are raised for the first time on appeal. It was submitted that the objections are law points that can be raised for the first time on appeal. I shall assume that these are law points. A court of appeal has a discretion to consider a point of law raised for the first time on appeal.¹² It must be shown that it would be in the interests of justice to entertain such a point.¹³

[27] The preliminary issues are not contemplated in the pleadings in proceedings before the Labour Court. The points were available to Mr Manda when the Labour Court considered the matter. The Labour Court was not asked to decide any of the points. The points could have been raised by way of a cross-appeal. That would have allowed the appellants to place such facts as were available to them and to address the contentions raised by Mr Manda. The points, in substance, would make for a very different case by Mr Manda, in contrast to the case he advanced before the Labour Court. I find that it is not in the interests of justice to allow, in essence, the making of a new case on appeal. The Court will not consider the points.

[28] The appellants succeed on the first ground of appeal. It is, therefore, unnecessary to address the appellants' second ground of appeal. Their second ground of appeal is essentially an alternative to the first ground.

[29] I agree with the Labour Court that the award be stayed. The security bond by the Director-General constitutes satisfactory security as contemplated in section 145(7) of the LRA.

[30] I therefore make the following order:

Order

1. The appeal succeeds with no order as to costs.

¹² *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC) at para 39.

¹³ *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another* [2015] ZACC 34; 2016 (1) SA 621 (CC) at para 62.

2. The orders by the Labour Court are set aside and substituted with the following order:

‘1. The undertaking signed by the Director-General of the Department of Forestry, Fisheries and the Environment, attached as annexure “FA3” to the founding affidavit in case number J1668/2023, constitutes sufficient security as contemplated in section 145(7) of the Labour Relations Act, 66 of 1995.

2. The attachment of the second applicant’s goods is uplifted.’

O Mooki AJA

Nkutha-Nkontwana JA, Waglay AJA concur.

APPEARANCE:

FOR THE APPELLANTS: SJ Coetzee SC (together with N Stein)

(Heads drawn by N Rajab-Budlender SC and N Stein)

Instructed by the State Attorney, Pretoria.

FOR THE SECOND RESPONDENT: H Molotsi SC (together with M Makwela)

Instructed by Naidoo & Associates Inc.